(iii) The Court upon the hearing of any such case and after hearing the parties interested, if any appear, shall determine the issue of law and deliver its judgment thereon containing the grounds on which its decision is founded and shall remit to the Collector a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Collector on receipt of such copy shall dispose of the case conformably to such judgment.

(iv) No appeal shall be allowed from any order, direction, determination or decision of the Court under reference under this section without the leave of the said Court or of the Court of Appeal.

....."

That section expressly states that on a reference by the Collector of Estate Duty the Court shall *deliver a judgment* and, as is the usual practice of the Court, the judgment shall be under the signature of the Registrar and the seal of the Court. There, the Legislature had deliberately used the word "judgment" and by so doing, subject to the restrictions mentioned in sub-section (iii) of the section, has given a right of appeal to the Court of Appeal by virtue of section 36(1) of the Courts Ordinance 1948.

Hence, contrasting the language used in section 44 of the Estate Duty Ordinance, 1941, with that used in section 10 of the Control of Rent Ordinance, 1948, I have no doubt that there is no right of appeal from an opinion of the Court under the latter section.

Accordingly, the preliminary objection succeeds, and I would dismiss this appeal with costs to the respondent.

Appeal dismissed.

TAN BOON TECK v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Laville, J.) December 11, 1949]

[Muar — Criminal Appeal No. 10 of 1949]

Trade and Customs Enactment, Johore, ss. 39 and 45 — Possession — Power of Appeal Court in disposing of appeal in case where one act constitutes several offences, and there has been acquittal on one charge and conviction on another and an appeal from such conviction — Criminal Procedure Code, s. 316(b)(ii).

The appellant in this case was charged with another accused man in the alternative (1) with knowingly being in possession of uncustomed tobacco or (2) with knowingly conveying uncustomed tobacco. On these alternative charges, the other accused pleaded guilty to possession and the Court accepted his plea and convicted and acquitted him on the other alternative charge. Appellant claimed trial on both alternative charges. He was convicted on the first charge and acquitted on the second charge. The Appellate Court found that the conviction on the first charge cannot stand and the question arose as to what order the Court should make. It was argued for the appellant that this Court cannot now reverse the acquittal on the second charge and put the accused therein in peril again by ordering a retrial or alter the finding of the lower Court by convicting him on the alternative charge.

Held, (1) that mere **juxta** position is not enough to constitute possession. There must be something more, a nexus that establishes in the accused a power of controlling the thing said to be possessed. (2) That an appeal is merely a continuation of trial, and throws open all the evidence to re-examination in order to determine whether or not the various findings of the trial Court are correct. In a case where an act, or series of acts, is of such a nature that it is doubtful which of several offences has been committed, an appeal from a conviction for any one of the offences must lay the whole case open to interference of the Appellate Court, notwithstanding any order of acquittal by the trial Court in regard to any other offences.

Cases referred to :—

(1) *Nawi bin Buyong v. Public Prosecutor* (1935) F.M.S.L.R. 222; (1936) M.L.J. 71.

(2) *Krishna Dhan Mandal v. Queen-Empress* I.L.R. 22 Cal. 377.

CRIMINAL APPEAL.

W. H. Sault for the Appellant.

D. B. W. Good for the Respondent.

Cur. Adv. Vult.

Laville, J. : — In this case appellant was charged with another accused man in the alternative with knowingly being in possession of uncustomed tobacco or with knowingly conveying uncustomed tobacco. On these alternative charges, the other accused pleaded guilty to possession and the Court accepted his plea and convicted and fined him $5,000 or 15 months R.I., and acquitted him on the other alternative charge.

Appellant claimed trial on both alternative charges.

In such charges the onus is laid by law on the accused to prove that the goods are duty paid (sec. 45, En. 80) or that he did not know they were uncustomed (sec. 39 (ii), En. 80). The prosecution must prove that accused was in possession of the goods. In sec. 39 (i), when the charge is one of possession, the word 'knowingly' is redundant. One of the ingredients of possession is knowledge of the nature of the thing possessed by the alleged possessor and knowledge that it is within his powers and opportunity of disposal either exclusive to himself or jointly with others.

From the evidence in this case it is clear that appellant must have known that the article was tobacco, but was it at his disposal either jointly with the other accused or exclusively? On this point the evidence is that the other accused was in the left hand front seat of the car, that the rear portion of the car behind the front seat was occupied by sacks of tobacco, and that two persons were in the car. The evidence is that appellant was arrested in the car and had a driver's badge in his pocket, and it is a reasonable and acceptable inference that he occupied the driving seat and drove

the car. It is the only place in the car he could have been on the facts given in evidence.

It is possible that appellant was jointly responsible with the other accused for the venture in uncustomed tobacco and was joint owner of the tobacco with him and that the tobacco was at the joint disposal of both; in view of the admission by the other accused that he was in possession of the tobacco, evidence accepted by the Court, it is not possible that appellant was in exclusive possession of the tobacco. The issue therefore is: Was the other accused in exclusive possession of the tobacco, or was appellant in joint possession thereof with him? The prosecution case must be that the possession was joint and the onus is on them to prove it. The only evidence they have is the presumed knowledge by the appellant of the fact that the goods were uncustomed and that they were tobacco, and that appellant was in a car containing the tobacco, but in company with another man, the other accused, who claims possession of the tobacco.

As this Court has previously ruled in similar cases, mere *juxta* position is not enough to constitute possession. There must be something more, a nexus that establishes in the accused a power of controlling the thing said to be possessed. In this case no such nexus has been established. The evidence tends rather to establish the possession in the other accused. There is not only his claim to possession which the Court has accepted, but the fact that it was he who got out of the car to effect the disposal of the tobacco at the house in the back lane and knocked on the door. Appellant was in the driving seat and was in possession of a driver's badge, and in the absence of any evidence to the contrary it ought to be assumed in his favour that he was merely the driver of the car. I therefore hold that the prosecution have not discharged the *onus* cast on them of proving that the uncustomed goods were in the possession of appellant either jointly or exclusively. The word 'knowingly' in sec. 39(i)(e), as I have said, is redundant as far as mere possession is concerned, for there can be no criminal possession without the consciousness of the fact of possession. The conviction of the appellant for an offence under sec. 39(i)(e) cannot therefore stand.

The question, however, arises as to what order this Court should make. The appellant was originally charged and tried on two alternative charges, the first for knowingly being in possession of uncustomed goods contrary to sec. 39(i)(e) of the Trade and Customs Enactment, Johore, and secondly in the alternative of being knowingly concerned at the same time and place in conveying uncustomed goods contrary to sec. 39(i)(f) of the same Enactment. On the second charge he was acquitted, but on the first charge he was convicted. This Court has found that such conviction cannot stand, and it is argued for the appellant that this Court cannot now reverse the acquittal on the Second charge and put the accused therein in peril again by ordering a retrial, or alter the finding of the lower Court by convicting him on the alternative charge. In my view, both submissions are erroneous. An appeal is merely a continuation of the trial, and throws open all the evidence to re-examination in order to determine whether or not the various findings of the trial Court are correct. On this basis it has been held in *Nawi bin Buyong v. Public Prosecutor*[1] that where an accused charged with murder is convicted of attempted murder and acquitted of murder and appeals, that the Court of Appeal on allowing the appeal on the lesser conviction may, in spite of the fact that the Public Prosecutor has not appealed against the acquittal on the major charge, order a retrial on the original charge. The case of *Krishna Dhan Mandal v. Queen-Empress*[2] was approved. Therein it was stated:—

> "When an act, or a series of acts, is of such a nature that it is doubtful which of several offences has been committed, an appeal from a conviction for any one of the offences must lay the whole case open to interference of the Appellate Court, notwithstanding any order of acquittal by the first Court in regard to any other offences. . . . ."

Similar circumstances have arisen here. It was clear from the alternative charges that it was doubtful which of several offences the facts that could be proved would constitute, and on an appeal against a conviction for one of such offences, even though there was acquittal on the other and no appeal lodged against that, the whole case in regard to both charges is thrown open to the Court of Appeal for examination and correction if necessary.

In the case now under appeal, it is clear that the appellant knew that the charges against him were two and that the prosecution case was that either he was in possession of the tobacco which was in the car in that he was found in the car with it, or that if he was not the possessor of the tobacco, he was consciously conveying it though he knew it was uncustomed. Appellant knew that he must make his defence against the evidence called by the prosecution in regard to both charges, and it is clear from the notes of the submissions made by his Counsel at the close of the case that his Counsel was well aware of this. The Court decided wrongly which sub-section of the same section of the law under which he was charged applied and so recorded a conviction under the wrong sub-section and a corresponding acquittal under the other.

It is clear on the evidence produced that the facts proved are that uncustomed tobacco was being conveyed in car SC 1636; possession of that tobacco was admitted by the other accused and not proved against appellant. It is a reasonable, and in fact the only reasonable, inference on the evidence that appellant was the driver of the car which was conveying the other accused and the tobacco and that he knew he was conveying tobacco. It must be presumed by law (secs. 45 and 39 (ii)) that the tobacco was uncustomed and that appellant knew it was so since he called no rebutting evidence on this point. Appellant had ample opportunity to call and give evidence in defence on this charge but elected not to do so. The charge against the appellant therefore of having knowingly conveyed uncustomed tobacco is amply proved, and he should have been convicted of that offence and not of possession.

Under the provisions of sec. 316(b) (ii), Criminal Procedure Code, this Court is empowered to alter the finding in a case tried on appeal and, *inter alia,* to reduce or enhance the sentence. I therefore order that the finding of the Sessions Court that appellant was guilty of possession of uncustomed tobacco be altered to a finding that he was guilty of knowingly conveying such tobacco contrary to the provisions of sec. 39(i) (f), Enactment 80, and that appellant is not guilty on the alternative charge under sec. 39(i) (e) and that the conviction of appellant on that charge be set aside.

As to sentence, the learned President, Sessions Court, found the appellant equally guilty with the other accused of a joint offence and rightly from that point of view inflicted on both similar sentences. But the appellant was guilty of a lesser offence; there is no evidence to show that he had possession of the uncustomed tobacco or jointly entered with the other accused on the illegal venture of smuggling. It may be, from the evidence, that he was merely hired to convey the tobacco and was a paid servant of the prime mover in the matter, though with knowledge of its illegality. I therefore consider that the sentence inflicted on him should be reduced but the wording of the Section makes it impossible to inflict a fine of less than $5,000/- in the circumstances and therefore the sentence must stand, but the imprisonment in default will be 8 months' simple imprisonment to date from this conviction.

Finding altered.